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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/943,574	08/30/2001	Georges Smits	MALD RAFF.16 CON2	2537

7590 07/01/2004

Hayes, Soloway, Hennessey, Grossman & Hage, P.C.
175 Canal Street
Manchester, NH 03101

EXAMINER

OWENS JR, HOWARD V

ART UNIT	PAPER NUMBER
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1623

DATE MAILED: 07/01/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/943,574

Applicant(s)

SMITS ET AL.

Examiner

Howard V Owens

Art Unit

1623

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 15 December 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 30-59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 30-44 is/are allowed.
- 6) ☒ Claim(s) 45-59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

Response to RCE

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 12/15/2003 has been entered.

An action on the merits of claims 30 - 59 is contained herein below.

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Nonstatutory Double Patenting

The rejection of claims 45-59 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-9 of U.S. Patent No. 6,303,778 is maintained for the reasons of record set forth herein.

An obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but an examined application claim not is patentably distinct from the reference claim(s) because the examined claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985). Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 40-59 are generic to all that is recited in claims 1- 9 of U.S.

Patent No. 6,303,778. That is, claims 1-9 of U.S. Patent No. 6,303,778 ('778) fall entirely within the scope of claims 45-59, in other words, claims 45-59 are anticipated by claims 1-9 of '778. The washing steps of claim 2 of '778 would inherently include washing with water set forth in instant claim 2. Instant claims limit the process for producing a fractionated polydisperse inulin composition, wherein the native polydisperse inulin is native chicory inulin or fractionated chicory inulin and the rapid cooling is between 15° C and 25° C at a rate between 1° C and 7° C/sec., respectively. Claims 45-59 contain physical properties of the composition produced which purportedly differentiate the claims from those of '778; however, the process is the same. If the process does not change, it is inherent that the products formed therefrom also would not change. Thus even though there is no recitation of the specific properties such as radial symmetry and perpendicular fade cross, the process of the instant claims and those of '778 are the same.

Claim Rejections – 35 U.S.C. 103

The rejection of claims 30-44 under 35 U.S.C. 103 over Kunz et al. (Kunz), U.S. Patent No. 5,478,432 is withdrawn in view of applicant's amendment to the claims, narrowing the particle shape to spherical, which excludes the spherical/elliptical shapes set forth in Kunz.

Allowable Subject Matter

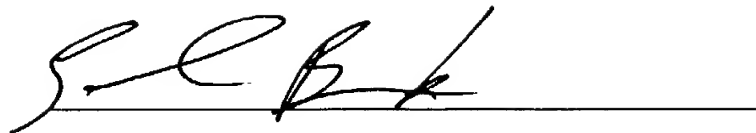
Claims 30-44 appear to contain subject matter allowable over the closest prior art of record, 5,478,432, for the reasons cited supra.

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Howard V. Owens
Patent Examiner
Art Unit 1623

A handwritten signature in black ink, appearing to read 'S. Barts', is written over a horizontal line.

Samuel Barts
Primary Patent Examiner
Technology Center 1600

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Howard Owens whose telephone number is (571) 272-0658 . The examiner can normally be reached on Mon.-Fri. from 8:30 a.m. to 5 p.m.

If attempts to reach the examiner by telephone are unsuccessful, the Supervisory Patent Examiner signing this action, James O. Wilson can be reached on (571) 272 - 0661.